

FOCUS

2023

Legislative Review/ Preview Report

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Upon seeing the majority of COVID-related restrictions expire over the course of 2022, one may be forgiven for expecting a return to a less disruptive legislative environment. However, this has not proven to be the case. To the mix of simmering issues such as access to affordable housing and culturally sensitive K-12 curricula, 2022 tossed in the *Dobbs* decision. Returning the fundamentals of reproductive rights to state legislatures for the first time in nearly 50 years has caused an abrupt shift in state legislative priorities. From access to abortion and contraception, to taxes imposed on menstrual products and diapers, 2022 has been marked by a stunning increase in activity on these and related fronts. But just as an individual must grapple with not one, but myriad matters, so too must a country. Most notable among these have been efforts to regulate the storage and use of digitally rendered personal information and, relatedly, the role of and oversight over cryptocurrency in the economy. With these matters yet to be resolved, 2023 is likely to be shaped by the defining trends of its predecessor.

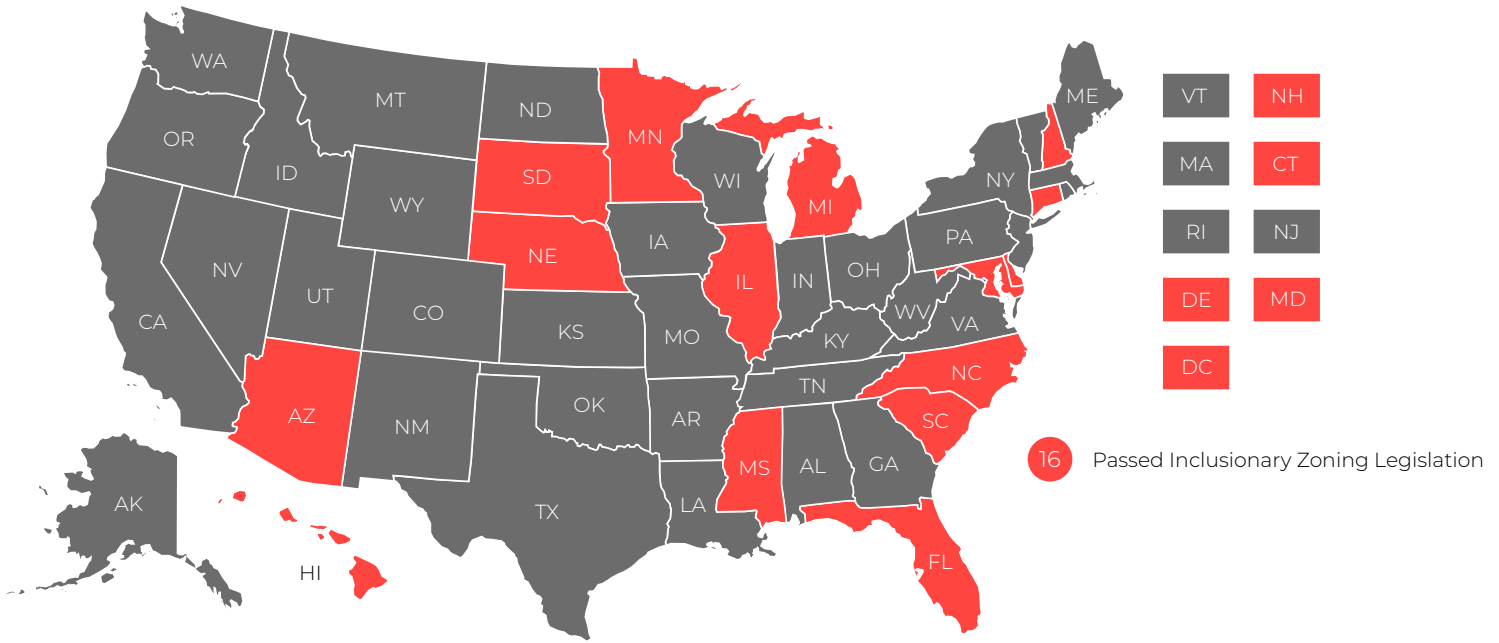
AFFORDABLE HOUSING

America's shortage of affordable housing is a longstanding issue. [CNN](#) reports that the U.S. has fallen behind by approximately 5.5 million units over the past 20 years as builders have failed to match the pace of household growth. This crunch only tightened in 2022, as historically low supplies of available homes coupled with increasing demand drove both rent and home prices to unprecedented heights. Adding insult to injury, most temporary relief measures meant to keep people housed during the pandemic, such as low interest rates, have expired. With there being a general consensus among housing policy experts as to the need to provide a steady supply of new, moderately priced homes, many state legislatures have begun to act.

Leading this year in legislative housing reform, **California** enacted a sizeable housing and homelessness [package](#) at the end of September designed to accelerate home construction. [The Middle-Class Housing Act](#) and the [Affordable Housing and High Road Jobs Act of 2022](#) employ development strategies like inclusionary zoning to incentivize private developers to incorporate affordable housing into their projects and accessory dwelling units. Accessory dwelling units are typically separate living spaces added to an existing single-family lot, like in-law suites and guest houses. **Colorado, Maine, Massachusetts, New York, Oregon, Rhode Island, Utah, Vermont** and **Washington** also enacted accessory dwelling unit legislation in 2022 and another 16 states introduced inclusionary zoning legislation. These tactics promote “gentle” density, an attached ground-oriented housing density that integrates duplexes, rowhouses and the like, to encourage small-scale construction projects. [The State of the Nation's Housing 2022](#), a report from the Joint Center for Housing Studies of Harvard University, shows a record number of homes are currently under construction nationwide. However, supply-chain issues, labor shortages, and regulatory constraints on homebuilding continue to delay their completion, leaving 1.6 million homes still under construction as of April.



The economics responsible for worsening housing affordability show it will take time for any additional supply provided through state legislation to catch up with demand. Meanwhile, the challenge of residential construction requires collaboration between public and private sectors. FOCUS anticipates more states to use similar “gentle” density strategies to address the problem in 2023.



SALES TAX EXEMPTIONS

DIAPERS

According to [The Pew Charitable Trusts](#), there is growing momentum to eliminate taxes on diapers due to a mix of factors, including rising inflation, swelling state budgets and abortion bans becoming effective in some states. This could mean greater chance of passage for legislation in 2023 in those states that considered but did not enact permanent diaper tax exemptions in 2022, such as **Alabama, Arizona, Indiana, Kansas, Mississippi, Missouri and Washington**. According to the [National Diaper Bank Network](#), of the states that impose a statewide sales tax, in 1981 **Minnesota** was the first to exempt diapers from tax. That list has since added another 12 states, with **Colorado, Iowa, Maryland and Virginia** most recently passing laws in 2022 to exempt diapers. **Florida and Indiana** created extended sales tax holidays; Indiana’s expired in August 2022 while Florida’s continues into 2023 (as [enacted](#), the exemption would need to be renewed annually). **New York**, which has exempted diapers from state sales tax since 2006, [enacted a law](#) in July 2022 to also exempt diapers from local sales taxes.



The [IndyStar](#) reports that bills to exclude diapers from tax did not make it out of their committees in 2019 or 2020 when helmed by **Indiana's** Democratic lawmakers, but [HB 1001x](#) did at least make it out of the House during the summer special session; the bill contained numerous other provisions and was authored by Rep. Sharon Negele, R-Attica. [The Topeka Capital-Journal](#) reports that in **Kansas**, recently re-elected Democratic Gov. Laura Kelly is expected to renew her push to eliminate sales taxes on groceries and hygiene products, bolstered by healthy consensus revenue estimates. Republicans were resistant to allowing such exemptions in past legislative cycles; however, Governor Kelly's gubernatorial Republican challenger Derek Schmidt had also taken up [advocating](#) for the adoption of a sales tax exemption for diapers later in his campaign. In **Ohio**, two bills were being considered that would exempt diapers from taxes, though neither saw any significant movement. Republican Gov. Mike DeWine came out in support of the legislation in October 2022, as part of an overall plan to make the state “the best place to have a baby” in light of a looming near-total abortion ban, reports the [Cincinnati Enquirer](#). In **Texas**, bills have also been prefiled to “address the fact that there are fewer abortions by [proposing to eliminate] sales taxes on maternity clothes and diapers,” reports [D Magazine](#).

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BREAST PUMPS

On April 19, 2022, **Illinois** [enacted a law](#) that included an exemption from taxes for breast pumps and storage supplies, followed by **Rhode Island** in June which included an exemption as part of its [budget bill](#). They became the latest states to join **Connecticut, Louisiana, Maryland, Minnesota, New Jersey, New York, Oklahoma** and **Pennsylvania** in explicitly exempting breastfeeding supplies from tax, without other conditions needing to be met, such as having a prescription. Both **Washington** and **Wisconsin** considered, but failed to pass, legislation that would have exempted breast pumps and related supplies from taxation in 2022.

In 2019, the [Tax Foundation](#) described the push for exemptions for breastfeeding supplies as a “new advocacy effort”, with [proponents](#) pointing out that formula is typically exempt from taxes and that pumping supplies are arguably a necessity for nursing mothers. The **Illinois** law was originally [pushed for](#) by the Breast Pump Policy Coalition, [newly formed](#) by the American Association for Homecare in 2021. Those opposed to exemptions for breastfeeding supplies base their arguments on the same ones historically made against allowing exemptions for any specific item, including diapers and feminine hygiene products, arguing they would narrow the tax base and make the tax code more complicated. Also, unlike diapers or menstrual products, an individual's health insurance will likely cover breast pumps, as mandated by the [Affordable Care Act](#); breastfeeding



supplies may also be tax deductible. However, other states may still move forward with exempting such items from sales tax. At least one [bill request](#) has been filed in **Kentucky** for 2023, which would include exemptions for feminine hygiene products and diapers along with breast pump kits, collection and storage supplies. The state considered similar legislation in 2022 with [HB 432](#), but it died without much consideration.

MENSTRUAL PRODUCTS

According to the [Alliance for Period Supplies](#), menstrual products are typically taxed as “luxury items” rather than as a basic necessity. While **Minnesota** was again the first to exempt such items from tax in 1981, the trend did not really start picking up the pace until 2013, when **Massachusetts** reclassified period products as medical devices. States that enacted legislation in 2022 to eliminate taxes on the products include **Colorado**, **Iowa**, **Nebraska** and **Virginia**.

Like the recent change in stance toward diaper tax exemptions, more Republicans are beginning to show support for eliminating sales taxes on menstrual products and other feminine hygiene items, which are already exempt from tax in 24 states. In **Texas**, where Rep. Donna Howard, D-Austin, filed [HB 70](#) for 2023, and had filed similar legislation since 2017, Republican Gov. Greg Abbott made a [statement](#) in August saying he would sign a bill if it reached his desk. This statement was made shortly after publication of an encouraging [press release](#) by the Texas Comptroller of Public Accounts in conjunction with Sen. Joan Huffman, R-Houston, the chair of the Senate Finance Committee, where previous legislation proposing similar tax eliminations had died. [SB 128](#), which is akin to HB 70 and identical to [HB 510](#), is sponsored by Sen. Drew Springer, R-Muenster.

In **Kentucky**, Louisville’s Democratic Mayor Greg Fischer [signed resolutions](#) in August to end taxation of diapers and feminine hygiene products, describing the items as “necessities of life for children and women.” Legislation [filed in past sessions](#) has failed to gain traction; however, at least two similar bill requests have already been filed for the 2023 session.



In 1973 the U.S. Supreme Court ruled in [Roe v. Wade](#) that there exists a constitutional right to abortion. In 2022, nearly 50 years later, the court ruled in [Dobbs v. Jackson Women's Health Organization](#) that the constitution does not confer a right to abortion. Written by Justice Samuel Alito, the [opinion](#) returned the authority to regulate abortion to “the people and their elected representatives.” In response, the Pew Research Center conducted a [poll](#) revealing that the majority of Americans disapprove of the decision and believe abortion should be legal in all or most cases. Not surprisingly, the *Dobbs* decision has generated a flurry of legislative activity as well as litigation.

Post-*Dobbs*, abortion is illegal in **Alabama, Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, South Dakota, Tennessee, Texas, West Virginia** and **Wisconsin**. While not categorically banned, severe gestational limits on the procedure exist in **Arizona, Florida, North Carolina, Utah** and, as of November 23, **Georgia**. The Georgia Supreme Court reinstated the state's six week ban on abortion only a week after a Fulton County Judge ruled it unconstitutional, reports [The Washington Post](#). Six weeks is the earliest that fetal cardiac electrical activity can be detected, making Georgia's law one of the country's most restrictive.

Outside the proceedings of court rooms, five states convened special session during 2022 in which reproductive rights have occupied a key place in legislative attention. First among them, **Indiana** lawmakers approved a statewide abortion [ban](#) in August outlawing the procedure with exceptions for the health of the mother and underage victims of rape or incest. In September, **West Virginia** followed suit, passing [HB 302](#), which barred abortions at all stages of pregnancy. In the same month, **South Carolina** lawmakers held a special session, but were unable to come to a compromise between the near total ban wanted by the House and the current six-week ban supported by the Senate. Ultimately, neither side won, owing to the six-week ban's pending challenge in the state's Supreme Court. For the time being, a 2016 ban on abortion after 20 weeks of pregnancy constitutes the law of the land. In response to these and other legislative efforts, **Wisconsin** Democratic Gov. Tony Evers called two special sessions, first in June and again in October, to repeal the state's controversial 1849 abortion ban. The governor's attempt failed due to the stalwart opposition of the state's Republican-controlled legislature, which gaveled in and out of both special sessions in the course of seconds.

In contrast, the majority of **Kansas** residents rejected a proposed state Constitutional [amendment](#) put before them in August that would have permitted state legislators to enact restrictions on abortion. [The New York Times](#) reports that three months later, midterm voters in those five states where abortion-related questions were on the ballot voted to secure access to the procedure or reject further limits. At the same time, not only [California](#) and [Vermont](#), but [Michigan](#) as well enshrined abortion protections in their constitution through ballot initiatives. In **Kentucky**, a ballot measure to declare abortion's lack of protection under the state's constitution [failed](#) and spurred further litigation against any such ban. A related [ballot initiative](#), one that would have forced doctors to provide resuscitation care for newborns with fatal prognosis, failed in **Montana**.



The issue of reproductive rights has been and continues to be an animating one with respect to state-level legislation. *Dobbs* only added fire to an already heated political topic, as evidenced by this season’s legislative action, the volume of prefiled legislation slated for debate in 2023 and the ongoing lawsuits in Kentucky, Michigan and Montana.

EMPLOYER/EMPLOYEE ISSUES

EMPLOYEE REPRODUCTIVE RIGHTS

As states are grappling with the aftermath of the U.S. Supreme Court’s decision in *Dobbs*, employers and employees are [caught in the crossfire](#) when determining their rights and responsibilities. In **California**, [SB 523/Chapter 630](#) was signed by Democratic Gov. Gavin Newsom on September 27; this law prohibits employment-related discrimination on the basis of reproductive health decision making.

In **Texas**, legislation has been filed by Republican lawmakers to “make the state’s abortion ban even [stricter](#),” notable among these being a [bill](#) that would prohibit employers from being eligible for tax incentives if they assist an employee in obtaining an abortion, including by “paying all or part of any charges associated with the procedure or costs associated with traveling to a location for the procedure.” On the other hand, [legislation](#) was also filed in Texas to define “employee benefit” to include “payment for the costs associated with receiving healthcare service in another state” and would prohibit civil or disciplinary actions taken against employers based solely on their offering or providing a particular employee benefit. In **Arkansas**, [HB 1006](#), filed for 2023, would require employers that cover abortion costs or related travel expenses to also provide 16 weeks of paid maternity leave if the employee is a state resident.

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In addition to state legislation, employers and employees need to be mindful of city-level action. In **Pennsylvania**, where a proposed constitutional amendment was recently approved by the legislature that states that the constitution does not guarantee any rights to abortion or public funding for abortions, the Philadelphia City Council advanced a package of ordinances to, in part, update the city’s anti-discrimination law to prevent workplace discrimination on the basis of abortion, birth control or fertility assistance, reports the [Philly Voice](#).



Pay transparency legislation has been picking up momentum on both state and local levels. **New York** is the poster child for this trend; on the state level, [SB 9427](#) passed the legislature on June 3 and is pending action by Democratic Gov. Kathy Hochul who, according to [The Employer Report](#), is being urged by business groups to “tweak the bill before signing it to preempt local pay transparency ordinances...to avoid the patchwork of pay equity laws around the state.” More locally, Ithaca, New York City and Westchester County have each already enacted their own laws regarding pay transparency.

States that enacted wage transparency-related legislation in 2022 include **California** and **Washington**; other states that considered similar legislation include **Alaska, Arizona, Georgia, Indiana, Kentucky, Massachusetts, Missouri** and **New Jersey**. **Michigan** and **Pennsylvania** had pay transparency legislation introduced in 2021 that did not see action during the 2022 portion of their respective biennial sessions. While the push for greater pay transparency in job postings is [likely to continue](#) as part of the larger movement for pay equality, it is also likely that states that have already enacted such laws may revisit them to insert provisions preventing prospective employers from circumventing such requirements. According to the [Wall Street Journal](#), some companies are currently attempting to sidestep the New York City ordinance by posting broad salary ranges – sometimes stretching hundreds of thousands of dollars.

K-12 CURRICULUM REFORMS & PARENTAL RIGHTS

In 2022, we saw the beginning of what will likely become an influx of bills aimed at increasing regulation of K-12 curriculum in 2023. The debate over “critical race theory” has been a common conversation in the education space over the last few years and has resulted in several states continuing to introduce bills to ban or restrict it in K-12 public schools or schools receiving public funding. More recently, the conversation has begun to push beyond critical race theory instruction to involve concerned parent’s groups seeking removal of books in public school and community libraries over concerns of obscene or inappropriate content. In March, **Florida** passed [HB 1557](#), commonly called the “Don’t Say Gay” law, which includes the banning of LGBTQ language from grades K-3, reasoning that it’s “inappropriate” for certain ages. According to [CBS News](#), boosted by an overwhelming re-election victory in November, Republican Gov. Ron DeSantis expressed his commitment to going further, stating that “Florida is where woke goes to die.”

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Increasingly concerned about what was being taught to their children, in 2020 parents began attending school board meetings in large numbers to push bans on the teaching of “critical race theory” along with standards such as masking and remote learning. Emboldened by several legislative victories on this front, a number of groups have organized around the call to limit “inappropriate” public school sexual health education, as well as the removal of books argued to contain obscene materials. According to [Education Week](#), “the number of books challenged in and banned by school districts has escalated sharply since 2021”. Organizations like Moms for Liberty have been very active in this space, asking for further regulation at events like School Board Meetings, according to [The New Yorker](#). This increased interest in banning certain materials in public schools and libraries will likely bring about an increase in legislation seeking to enact such bans.

In addition to restrictions on what are deemed harmful materials, **Missouri SB 775**, which passed in August and is expected to be expanded next session, allows for the charging of librarians with misdemeanors over noncompliance. Similarly, the Missouri secretary of state has begun issuing [proposed rules](#) limiting the content of public libraries as well as creating procedures for challenging a library’s age-appropriate designations. Additionally, legislation has been prefled that would limit curricula on sexual orientation and gender identity in the absence of parental consent. Similar bills have been prefled in **Texas**, along with those to regulate sex education and requiring instruction that human life begins at conception as well as emphasizing the “dignity and worth” of human life from the moment of conception. With respect to critical race theory, **Wyoming’s HB 97** was introduced in 2022 to ban its teaching in schools.

States like **Tennessee** (with [HB 2451/SB 2360](#)) have already prefled or introduced general parental rights bills, looking to give parents more control over what is taught to their children. Several other states are expected to introduce bills on parental rights, including **New Hampshire**, where a legislative service request on the subject has been filed. While covering a broad array of particular topics from state to state, these bills all share in the growing desire among many parents to have more control over the scope and content of their children’s education.



PRIVACY & PERSONAL INFORMATION

In the continuing absence of federal action, privacy legislation proliferate across the country. In 2022, **Connecticut** and **Utah** joined **California**, **Colorado** and **Virginia** as the only states to pass omnibus privacy legislation. **Washington**, which has unsuccessfully attempted to pass legislation four previous times, is likely to try again in 2023; however, longtime proponent Sen. Reuven Carlyle, D-Seattle, did not seek re-election in November. Similarly, another privacy focused legislator, **Oklahoma** Rep. Colin Walke, D-Oklahoma City, opted out of a re-election bid. As in past years, related legislation is expected in **Florida**, with the caveat that long time privacy bill sponsor Rep. Fiona MacFarland, R-Sarasota, has indicated that changes in legislative leadership may render unlikely the passage of legislation on this issue, according to [IAPP](#).

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Other states likely to examine privacy and personal information legislation include **Alaska**, which considered legislation last session with the backing of Republican Gov. Mike Dunleavy, and **Ohio**, which contemplated legislation endorsed by Republican Gov. Mike DeWine. For its part, **Massachusetts** will most likely re-introduce privacy protection legislation, as Democrats will soon have a trifecta in the state, thus giving such efforts added traction. Additionally, according to [Husch Blackwell](#), **Oregon's** attorney general's office has been holding regular workgroup meetings to draft legislation for the upcoming session, while in **Montana**, lawmakers have filed numerous bill draft requests relating to privacy.

Child-specific privacy legislation is also expected to garner consideration in several states, as exemplified by **California's** [Age Appropriate Design Code Act](#), which, broadly speaking, requires businesses providing online services, products or features likely to be accessed by children to comply with specified standards. To this point, **Utah** lawmakers are currently working on a bill aimed at a similar purpose.



Crypto had its fair share of headlines in 2022, drawing significant and often unwanted state attention to the industry. With the price of Bitcoin falling, crypto lenders going bankrupt and high profile lawsuits, crypto has never seen this much mainstream public spotlight and it has prompted lawmakers to try to regulate these digital assets.

On September 16, the White House released the first ever [Comprehensive Framework for Responsible Development of Digital Assets](#), a combined result of 21 departmental reports offering recommendations designed to protect consumers, advance environmental sustainability efforts and further national security. The federal guidance provided in 2022 was reflected in state legislation seen this year in **California, Montana, New Jersey, New York** and **Wyoming**.

The most prominent state response to crypto's environmental concerns was by **New York** with [SB 6486/Chapter 628](#).

The act set a moratorium on the mining of cryptocurrency using nonrenewable sources of energy. It was one of the most highly contested bills of the session and even New York City Democratic Mayor Eric Adams joined in [lobbying](#) the governor to veto the bill. The act ended up being signed after the governor won re-election in the midterms.

Consumer protection ended up being one of the most prominent issues in the states, with **Connecticut, D.C., Iowa, New Hampshire, North Carolina, Rhode Island, Utah, Vermont** and **Washington** enacting relevant legislation. Most laws ended up settling with registration with a government agency or assembling a commission to study the issue as their main asks. But with one of the largest trading platforms, FTX, [going bankrupt](#) this year, and millions of investors expected to not be able to reclaim their money, it is likely that most states will pass more targeted consumer protection laws for the crypto industry.

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